Supreme Court, U.S.
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DOCKET NO:

In The

Supreme Court of the United States

October Term, 1997

ATHANASIOS RODITIS and CATHY RODITIS

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. It is not disputed that on March 25, 1992 Petitioner, plaintiff Athanasios Roditis, slipped and fell and severely hurt himself on icy, slippery steps of a post office at Great Neck, New York. Should the trial court have granted Respondent's cross-motion for summary judgment dismissing this action supported solely by statements from attorneys with no personal knowledge of the facts plus excerpts from contradictory and confusing deposition testimony from another individual, a caretaker/janitor who had no personal knowledge of the facts?

II. In compliance with the Federal Tort Claims Act, a notice of claim form for both Mr. Roditis and for Cathy Roditis, his wife, was filed. The form was signed only by Mr. Roditis. The form specifically permits an agent to sign a claim form on another's behalf. Should the trial court have granted Petitioners' motion dismissing Respondent's "Second Defense" that Petitioner Cathy Roditis, due to her failure to sign the claim form, failed to exhaust her administrative remedies even though the form was signed by her husband; her claim was noted on the form; the instructions on the form indicate that an agent may sign on behalf of a claimant; and, as a matter of law, the form contained information sufficient to give notice of the occurrence?

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CITATIONS TO OFFICIAL AND UNOFFICIAL JUDGMENTS AND ORDERS

Petitioners seek review of the Judgment of the United Stated Court of Appeals for the second circuit dated August 6, 1997, docket number 96-6231; and the judgment (by visiting judge Manuel Real) of the District Court for the Eastern District of New York dated July 2, 1996, docket number 93 CV 4480. A petition for rehearing was denied on October 2, 1997. Copies of the judgments and opinions are annexed hereto in the appendix.

BASIS FOR JURISDICTION OF THIS COURT

This petition involves an appeal from the second circuit Court of Appeals over which this Court has jurisdiction. Jurisdiction was placed in the court of first instance because the United States of America is the defendant and the action arose under the Federal Tort Claims Act (FTCA).

STATEMENT OF THE CASE

This is an action for damages arising out of a serious personal injury suffered by Petitioner, plaintiff Athanasios Roditis. On March 25, 1992 Roditis slipped and fell on slippery,

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icy steps at a post office in Great Neck, N.Y. He suffered a herniated disk. Petitioner Cathy Roditis is the wife of Petitioner Athanasios Roditis and, as plaintiff, set forth causes of action for loss of consortium, support and companionship.

Roditis had just parked his vehicle in a parking lot behind the aforesaid post office. He left the parking lot through a westward facing walk-way that led to a landing which was located approximately behind the left-most 1/3 of the post office. The landing was sandwiched between the rear of the post office and the parking lot. To the right of the landing was a stairway where the accident occurred. The stairway is a 3-step stairway leading down to a sidewalk that heads north to the public sidewalk which borders the public street. According to Respondent's witness, this post office stairway and sidewalk which led to the street was open to members of the public on the day of the occurrence and was not under construction. This stairway is where the accident occurred. Forward of the landing was another longer stairway down to a door that led to a lower level of the post office. This longer stairway was not barricaded or otherwise inaccessible. To the left of the landing was a stairway up to a doorway that was barricaded. Ostensibly, construction was taking place behind the barricade.

As a result of his injury Mr. Roditis has not been employed and the Roditis family was forced to surrender their home and move in with Mr. Roditis' family. They are currently on welfare.

After a timely filed Claim for Damage form was presented under the Federal Tort Claims act ("FTCA" hereafter) on behalf of both Petitioners and no adjustment of the claim was undertaken, an action was instituted in the district court. In their

answer, the defendant-respondent included a defense labelled "Second Defense" which alleged that Petitioner Cathy Roditis failed to exhaust administrative remedies due to her failure to sign the claim form. The claim form was signed by her husband; her name was printed thereon; her claim was noted on the form; and the instructions on the form indicate that an agent may sign on behalf of a claimant.

After the completion of discovery, Petitioners moved to strike the second defense regarding the failure to exhaust administrative remedies and Respondent cross-moved for summary judgment dismissing the action on the grounds that the Respondent had relinquished control of the place of occurrence to a construction company, an independent contractor. The Respondent's motion was supported by affirmations of attorneys who had no personal knowledge of the facts and a copy of the deposition testimony of Mr. Edgar Penny, a maintenance employee who also had no personal knowledge of the facts.

The motion for summary judgment was opposed by a sworn affidavit of Athanasios Roditis in which he stated that there was no construction taking place in the area where he fell and that there were no signs, notifications or other warning devices stating that the place of occurrence was off-limits to anyone. He also stated that the place of the occurrence was open to all and that access to the site was unimpeded.

In his deposition, Mr. Penny, the Respondent's maintenance employee, discussed several locations on the post office premises. Some of the locations discussed were under the control of the construction company and some were not. When discussing the specific site of the occurrence Mr. Penny clearly

and unequivocally stated that the site was open to the public on the day of the occurrence and available for the public's use.

The action was reassigned from Judge Allyn Ross to visiting Judge Manuel Real. Petitioners' motion was denied and Respondent's motion was granted.

ARGUMENT

Issue I

Petitioners do not dispute the concept that under the Federal Torts Liability Claims Act (FTCA) the United States bears no liability under Federal, State or other law for the tortious acts of its contractors. What Petitioners are attempting to communicate is that the Petitioner had his accident on a portion of the Respondent's premises which was *not* under the control of a contractor. If this is the case then, under local law, the Respondent *may* bear liability for the occurrence herein. At the very least, the issue is in dispute and warrants a trial.

Edgar Penny, Respondent's only deposition witness, was not an eyewitness to the accident. In fact, he testified that he first heard about the accident when he was contacted by the U.S. Attorney's office about a month-and-a-half before his deposition which was 3 1/2 years after the accident. He testified that he first saw the Respondent's three Polaroid photos of the site about a week before his deposition. The undersigned is the only attorney still connected with this case who was present at the Penny deposition.

What we have here is a classic case of "apples and oranges". In his deposition, Penny spoke of two different areas - one area which includes the site of the occurrence and which was not under construction and a second site which was behind a barricade and probably had construction activity.

The error in the Court of Appeals decision is evident in their finding that Penny, on at least five occasions stated that the area in which plaintiff fell was off limits. Penny said nothing of the sort. Penny never saw the accident and never said that plaintiff fell in one place or another. Penny discussed different areas, some of which were off-limits due to construction and some that were not. The fact is that plaintiff fell in a area that was not off limits and was not included in the area that Penny said was off limits. In fact, in the only part of the deposition where Penny discusses the site of the occurrence Penny testified clearly and unequivocally that there was no construction taking place there; and that the area was open to the public for bulk mailing on the day of the accident. Furthermore, when directly questioned as to whether this was the case at the time of the accident, March 25, 1992, Penny said "sure".

What follows is the verbatim exchange between Mr. Penny and the Petitioners' counsel regarding the precise area of the occurrence. When asked if there was a customer entrance in the back of the post office Penny stated the following:

> **A.** I assume if people want to come in for some reason, for bulk mailing, they could use the back entrance, yes, but not usually.
>
> **Defendant's Attorney**. (*to plaintiffs' attorney*) Is there a time frame you are talking about here?
>
> **Plaintiffs' Attorney.** At any time.
>
> **A.** (*By Penny*) At any time, it's the same thing.
>
> **Q.** Was that the case back in March of '92.
>
> **A.** Sure.

Q. Was there any construction taking place in the area forward from this doorway to the sidewalk along this path?
A. No.

With further regard to the loading docks in the back which were open to the public, Mr. Penny was asked "Were those loading docks in use around March 25, 1992 to load and unload mail?" Mr. Penny's response was "I would assume so... yes." How could this be any clearer? As such, Roditis, by Penny's admission, fell in an area which was not only owned and operated by the Respondent and but which was open to the public for the public's use on the day of the occurrence! This means that the area in question was under the control of the Respondent and not any contractor and was being used for the Respondent's benefit in furthering their business interests..

Furthermore, when asked if the site of the occurrence was "blocked or open" on March 25, 1992, Penny said it was "open". When asked if there were signs indicating that the area in question was off-limits Penny said there weren't any. When asked if the area in question was in any way cordoned off, Penny said "it wasn't condoned off that I know of, no."

The further fact is that Penny himself that he himself was going to clean snow from the area in question until some supervisor negligently told him to only clean the perimeter of the building. Petitioners submit that it was negligence for Penny not to clean the area in question; that, if the supervisor did indeed tell Penny not to clean a public area, that it was negligence for the supervisor to have given Penny this erroneous instruction; and if the supervisor, when speaking to

Penny, did not tell Penny to refrain from cleaning this public area that it was negligent for Penny to misconstrue what the supervisor told him.

At the time of the accident the construction project had been underway for several months. Mr. Penny had been at this particular post office for about 11 years and was, in fact, the head of its maintenance department. Nevertheless, he indicated that he was about to clean the area in question and came in an hour early that day to perform his snow removal duties until told by one "Bobby G." not to do so. If Penny, until stopped by "Bobby G.", thought that the post office was responsible for the area in question how was a member of the general public, like Mr. Roditis, supposed to think otherwise? Furthermore, if the place of the occurrence was under the control of the contractors as the Respondent asserts, it was negligence for the Respondent, who is not an absentee property owner, to fail to insist that their contractor remedy the situation.

To illustrate that Penny was talking about two different areas in his deposition testimony the Court will note that when Penny was asked whose job it was to remove snow on the day in question, Mr. Penny said "That area was not removed. That was off-limits to all postal employees, including myself, because of contract work. It had a barrier there which nobody could get through, a platform." Ignoring the fact that Penny's answer was wholly unresponsive to the question, the area referred to by Penny as "that area" was not the area where Roditis fell. Penny was talking about a platform that was behind a barricade which may have been in the construction area. In fact the barricade he is talking about is a plywood barricade that was nailed to a doorway, completely covering it. The barricade

is visible in the doorway at the end of a walkway in a photo taken by Respondent. The platform is behind the barricade and was a part of the construction area. Furthermore, Penny alternately described the construction area as a "roped-off" area and as an off-limits area beyond a wooden barrier. Roditis never ventured behind any barricades or roped-off area. Roditis did not fall in the area described by Penny in this portion of his deposition there nor did he attempt to go into that area. If he had we would have no dispute with the outcome of this action and we would quietly go away.

It is not disputed that Roditis never entered upon any area that was roped off, barricaded or otherwise restricted to members of the public. He used only those areas that were open to the general public as of the day of the occurrence. Even Respondent's own photos failed to reveal any roped off area.

We also have serious problems with the Court of Appeals reasoning. They stated:

> That the stairs themselves were not under construction, or immediately surrounded by active construction work, is not dispositive. The span of a construction site is not limited to the precise area where the construction is taking place; it includes adjacent areas as well. Moreover, the absence of barricades or warning signs does not establish that the area was outside the control of the independent contractor. (Appendix, page A-7, last paragraph, next-to-last line.)

First of all, while the span of a construction site may not be limited to the precise area where construction is taking place there is no absolute measurement that can be used to make this determination. Is it 10 feet? 25 feet? 100 feet? More? Less? This all depends upon the particular circumstances which a trial should determine. In any event, in our case, we would argue that the construction site began, more or less, at the place where the premises was cordoned off.

Furthermore, while it may be true that the absence of barricades does not dispositively establish that an area is outside the control of the independent contractor the *absence* of the barricades certainly does not indicate the it *is* within the control of an independent contractor.

In addition, we respectfully take exception with the Second Circuit's discussion in regard to photographs. The Second Circuit said:

> ... plaintiffs' own photographs indicate that the rear entrance of the post office, which is immediately adjacent to the spot where Athanasios fell, was boarded up - an unmistakable indication that the area where the accident occurred was within the zone of construction. (Appendix, page A-8, first full paragraph, ninth line.)

Firstly, it is not disputed that the photographs referred two are three (3) Polaroid instant photos taken by the Respondent not the Petitioner. Secondly, only one of the three photos shows the site of the occurrence. A boarded up doorway is visible in the background. Plaintiff never ventured beyond the

areas that were open to the public nor did he attempt to breach the boarded up doorway. We would say that a boarded up doorway indicates construction activity *behind* the boarded area, not in front of it.

With regard to the proceedings in the district court, what happened there was, in our view, with all respect, a matter of expediency. A visiting judge was brought in to help move the calendar. On or about May 20, 1996 Petitioners served its motion, returnable on June 3, 1996, to dismiss the Respondent's second defense. At the Respondent's request, Petitioners consented to an adjournment to July 2, 1996. In the interim, the assistant U.S. attorney that had been assigned to this case was replaced and this action was reassigned from the judge to whom it was previously assigned to the visiting judge. A so-called "status/settlement" conference was previously scheduled for Thursday, June 20, 1996.

On or about June 19, 1996 we were served with the Respondent's response to our motion plus a cross-motion to dismiss based on the Respondent's "first defense" of lack of control. The status/settlement conference was attended by the incoming assistant United States attorney, another person from her office, the undersigned and another attorney from the office of the undersigned. The status/settlement conference was presided over by the visiting judge, not the assigned judge. Petitioner spoke first. After discussing the facts we mentioned that motions were pending and described their objectives. On the spot, without having read one document or viewed one exhibit the visiting judge indicated that he was inclined to grant the motion to dismiss. Despite the fact that the rules, (Rule 56(c)) require 10-days notice and the fact that the previously

set date for the hearing of this motion and cross-motion was July 2, 1996, the visiting judge gave us until Monday June 24, 1996 at 4:30 p.m. to respond to the cross-motion to dismiss and produce authorities to persuade him not dismiss the action.

On June 24, 1996 we appeared with our papers, including authorities, at the appointed time and place. We were informed that the judge left early and that we would now be expected to appear at 8:30 a.m. on June 25, 1996, which is a half-hour before the building opens and one hour before business customarily commences in the district. The necessary moving papers plus accompanying memorandums were submitted to the visiting judge. Each side had about a minute or two to verbally support the arguments in their papers. The court immediately rendered its decision dismissing this case without consulting papers, authorities, exhibits or anything, a process referred to by this Court in the case Celotex Corp. v. Catrett, 477 U.S. 317, as "railroaded".

On a motion for summary judgment, the inferences to be drawn from the underlying facts contained in (the moving party's) materials must be viewed in the light most favorable to the party opposing the motion. Adickes v. S.H. Kress, 398 U.S. 144 citing United States v. Diebold, Inc., 369 U.S. 654.

Petitioners have more than met their burden of showing that there are material facts in dispute. As such, summary judgment is unwarranted and should have been denied. Celotex Corp. v. Catrett, supra.

There was discussion that Petitioners were trying to hold the Respondent strictly liable for the occurrence. Petitioners do not dispute that the FTCA does not confer strict liability upon the United States. However, Petitioners have

never cast this action in strict liability terms. In fact, there is no strict liability in New York in regard to cases like this. In New York, strict liability is limited to statutory violations, products liability and some vicious animal cases. 103 N.Y. Jur 2d 389, 394, 395. New York is a pure comparative negligence state. CPLR 1411. Petitioner in this case can be found anywhere from 100% to 0.0% culpable for the occurrence herein.

One last point - Petitioners' papers included a copy of a page from a document called "Specifications" which was supplied by the Respondent in connection with the construction work in question. The document, a drawing of the post office premises with notations as to the proposed construction project, failed to show that any construction was planned for the site of the occurrence, which, in fact, is consistent with Penny's testimony. Even if this site were to later come under construction, which as far as we know it did not, under New York law it cannot be deemed part of the construction area. Where there is no evidence that a contractor for a public authority has actually commenced repairs at the site of an occurrence, the public authority remains liable even though the contractor might at some unspecified time make repairs. Kenyon v. City of New York, 194 A.D.2d 398; 598 NYS2d 508. When the contractor takes over the site liability will shift. A contractor cannot be held liable where an accident took place near but not at the site of construction. Pignataro v. Coen v. Con Ed v. Webco v. City of New York, 150 A.D.2d 222; 514 NYS2d 392. The circumstances herein clearly place liability for the occurrence on the Respondent.

The Petitioners' point is that the area in question was open to the public on the day of the occurrence and that it was

not part of the construction area. At the very least, Penny's testimony, even when read in a light most favorable to the moving party, the Respondent, (which happens to be the reverse of what we're supposed to do when deciding motion for summary judgment), suggests that there is more than enough material to make out a prima facia case in favor of the Petitioners due to the Respondent's negligence. When we have testimony such as that of Mr. Penny's, which can be interpreted one way or the other, summary judgment based on such testimony is certainly not warranted. After all, the purpose of the summary judgment procedure is not to decide issues but to see *if* there are issues. Quaratino v. Tiffany & Co., 71 F. 3d 58 (2d Cir. 1995). In this case there is most certainly an issue as to who controlled the area in question, among others.

If this were an action against any other proprietor or property-owner a motion such as this would have been denied in the bat of an eyelash as the Petitioners have clearly met their burden under Rule 56 by setting forth its theory and debunking Respondent's theories upon which it relied to support is application for summary judgment.

The fact that there can be good faith disagreement about what Penny said or meant to say clearly indicates that there exist at least some triable issues of fact warranting remand.

Issue II

In the case Borgren v. United States, 723 F.Supp. 581, a case in which the spouse of the injured party failed to sign a notice of claim, the court found that "the administrative claim filed by the Petitioner ... adequately provided sufficient

information to enable the administrative agency to conduct a full investigation of the incident which resulted in the Petitioner's injuries. That being the case, Respondent had adequate notice as required under 28 U.S.C. 2675.

In Hanlon v. United States, 134 F.R.D. 42, Judge Weinstein a most respected jurist of the very court where the instant action was pending decided, in an analogous case against the same Respondent, the Postal Service, that where one spouse did not sign a claim form, not only is the omission of a signature not fatal, the form of the notice to Respondent need not even be on the official claim form. Since serious injuries were alleged on Claim Form 95 with regard to the injured Petitioner, "an experienced agency such as the legal branch of the Postal Service should have anticipated [a] claim for loss of consortium"... "To satisfy the statutory requirement, the form of the notice must simply be sufficient to afford the agency the opportunity to investigate the claim." The court, in allowing the claim, noted that the complaint always referred to two Petitioners and included a derivative claim for loss of services/consortium. This is the standard which should be applied in this part of the country.

Where the administrative agency acknowledges a claim, even though the claim form was not signed by one claimant the government had sufficient notice and the tort claim could be maintained. Hilburn v. U.S., 789 F.Supp. 338.

In our case, the Respondent did acknowledge the claim of Cathy Roditis on at least one occasion prior to suit. After the Petitioners filed their first claim form counsel received Respondent's letter dated July 15, 1992. In said letter the Respondent clearly noted the names of both Petitioners which

makes it undeniable that they were aware of the claim of Cathy Roditis. In fact, after the institution of this action, her deposition was taken by the Respondent on September 28, 1995.

In another Postal Service case, very much like the case at bar, where both spouses were noted on the claim form but only one spouse signed the claim form, and unlike our case a sum certain was not filled in, the court allowed a loss of consortium claim against the Postal Service. Kokara v. U.S., 750 F.Supp. 542. The court held:

> Relevant legislative history supports a liberal construction of the exhaustion requirement. Congress had two main purposes in enacting section 2675(a) of the FTCA. First Congress sought to "ease court congestion and avoid unnecessary litigation, while making it possible for the government to expedite the fair settlement of tort claims against the United States." .... Second, Congress wanted to provide "fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with the government." The dominant theme of section 2675(a), therefore, is to apprise the agency involved in the activity which gave rise to the claim so that fair settlement can be effectuated if warranted. *See* GAF Corp. U.S., 818 F.2d 901, 919 (D.C.Cir. 1987) ("Congress repeatedly characterized presentment as a simple requirement of notice.") In Lopez v. U.S., 758 F.2d 806 (1985), the First Circuit stated, "The claims process is meant largely to furnish notice to the government sufficient to allow it to investigate the alleged negligent episode to determine if settlement would be in the best interests of all." .... Moreover, it seems fair to conclude that the FTCA is "intended to provide a

> framework conducive to administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits." Erxleben v. U.S., 668 F.2d 268.

Furthermore, the Kokaras court went on to say that since Mrs. Kokaras name was on the claim form, even though she did not sign it, the claim was validly presented and held that her husband's signature was sufficient because "28 C.F.R. 14.3 allows one's agent to file a claim of her behalf." This is exactly the theory propounded by these Petitioners in their motion to strike the Respondent's Second Defense and a similar result should ensue in our case.

A claim is properly presented within the meaning of section 2675(a) when the agency receiving the claim is given sufficient notice to commence investigation and the claimant places a value on the claim. Transco Lsg. Corp. v. U.S., 896 F.2d 1435 citing Adams v. U.S., 615 F.2d 284. Frantz v. U.S., 29 F.3d 222. In our case a value was put on the claim. Espousing these same principals the court in Santiago-Ramirez v. Secretary of the Dept. of Defense, 984 F.2d 16 stated "the law was not intended to put up a barrier of technicalities to defeat [Petitioners'] claims." (Citing Lopez v. U.S., 758 F.2d 806.) "A flexible approach is in keeping with the original purpose behind the filing of an administrative claim.... This approach to the notice requirement recognizes that Congress intended to leave the ultimate choice between settlement and suit in the hands of the claimant.... [The administrative agency] must have enough information that it may reasonably begin an investigation of the claim". In other words, in a case such as

that presently before the Court, where a sum certain is claimed and both Petitioners are named in the claim forms both claims are to be construed as valid and there is no justification for the dismissal of the claim of the spouse who did not sign a claim form.

Given the state of the law, particularly in the district where this action was pending, the Petitioners' motion to dismiss Respondent's Second Defense should have been granted.

CONCLUSION

For the reasons stated herein, it is respectfully requested that this Honorable Court grant the instant Petition and, thereafter, (i) restore Petitioners' action and remand the case to the trial court, thereby reversing the order of the court below granting summary judgment to Respondent; and (ii) grant Petitioners' motion to strike Respondent's "Second Defense" thereby reversing the order of the court below denying Petitioners' motion to dismiss the Respondent's said second defense.

Dated: New York, New York
February 25, 1998

Respectfully submitted,

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(212) 545-9011

MICHAEL L. GOLDMAN
Attorney for Petitioner

APPENDIX

GEORGE LANGE III,
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Second day of October, one thousand nine hundred and ninety-seven.

Present:
HON. Ellsworth A. Van Graafeiland
HON. John M. Walder, Jr.
Circuit Judges
HON. J. Garvan Murtha
District Judge.*

ATHANASIOS RODITIS and CATHY RODITIS,

Plaintiffs-Appellants,

v.

Docket No. 96-6231

UNITED STATES OF AMERICA,

USCA
FILED 8/6/97
George Lane III
Clerk 2d Cir.

Defendant-Appellee.

Appeal from United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
George Lange III,
Clerk
By:

_____/s/_____
Beth J. Meadbor
Administrative
Attorney

*The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1203—August Term 1996

(Argued April 8, 1997 Decided August 6, 1997)

Docket No. 96-6231

ATHANASIOS RODITIS and CATHY RODITIS,

Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

VAN GRAAFEILAND, WALKER, *Circuit Judges*, and MURTHA, *District Judge*.*

Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (Real, *J.*, sitting by designation) granting the United

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* The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

States' motion for summary judgment in this action for personal injuries and loss of consortium under the Federal Tort Claims Act.

Affirmed.

MICHAEL L. GOLDMAN, Goldman & Rio, New York, New York, *for plaintiffs-appellants*.

TRACEY L. SALMON, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Varuni Nelson, Assistant United States Attorney, Zachary W. Carter, United States Attorney, on the brief) *for defendant-appellee*.

PER CURIAM:

Plaintiffs, Athanasios and Cathy Roditis, appeal from a judgment of the United States District Court for the Eastern District of New York (Manuel L. Real, *District Judge*, of the United States District Court for the Central District of California, sitting by designation), granting summary judgment in favor of the United States and dismissing plaintiffs' suit seeking recovery under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, for personal injuries Athanasios Roditis suffered while delivering building material to an independent contractor performing construction work on the premises of the United States Post Office in Great Neck, New York.

Plaintiffs assert (1) that the district court erred in granting defendant's motion for summary judgment because there exists a material issue of fact as to whether the location at which the injury occurred was within the control of the United States at the time of the accident and (2) that, even if the injury occurred within an area under the control of an independent contractor, the United States is liable because, under New York tort law, a landowner owes a nondelegable duty to maintain its property. We reject both assertions and affirm.

I. BACKGROUND

On March 25, 1992, Athanasios Roditis ("Athanasios") slipped and fell on a patch of ice while attempting to negotiate a three-step flight of stairs in the rear of the United States Post Office in Great Neck, New York, injuring his back. At the time of the accident, Beys Specialty Contracting Corporation ("Beys Specialty") was constructing an underground parking area at the post office pursuant to a contract with the United States Postal Service ("USPS"). On the day of the incident, Athanasios was delivering materials to the construction site, located to the rear of the post office, for one of the project's subcontractors.

According to Athanasios, the accident occurred as he walked from the post office's parking lot to Beys Specialty's foreman to tell the latter that he had just arrived with a delivery of construction material. On the way, Athanasios claimed that he slipped on the stairs because snow and ice had not been properly cleared. According to plaintiffs, Athanasios was taken to a hospital and diagnosed as suffering from a recurrent herniated disc and other injuries.

Pursuant to 28 U.S.C. § 2675(a), plaintiffs filed two administrative claim forms, dated June 18 and July 21, 1992, alleging entitlement to recovery for injuries suffered as a result of the fall. On the forms, plaintiffs sought as much as $2,000,000 in recovery. Although Cathy Roditis ("Cathy"), Athanasios's wife, is named as a "claimant" on the forms, she did not sign the form or state, even in the most general terms, an injury connected with the accident. Following the denial of plaintiffs' claims, they filed an action in the United States District Court for the Eastern District of New York seeking $5,000,000 in damages for Athanasios's injuries and $1,000,000 in damages for Cathy's alleged loss of consortium. The United States answered alleging that an independent contractor, not the United States, was responsible for Athanasios's injuries and that Cathy had not stated a claim because she had failed to exhaust her administrative remedies as required by the FTCA.

After a period of discovery, plaintiffs moved to strike the United States' defense to Cathy's claim. The United States opposed the plaintiffs' motion to strike and filed a cross-motion for summary judgment on the entire complaint. After oral argument, the district court denied plaintiffs' motion to strike and granted defendant's motion for summary judgment. The district court concluded that, under the FTCA, the United States is not liable for the negligence of its independent contractors and that the area in which the accident occurred was controlled by the general contractor, Beys Specialty, and not the United States.

II. DISCUSSION

On appeal, plaintiffs contend that the district court erred in granting summary judgment because there exists a genuine issue of material fact with respect to whether the accident site was under the control of Beys Specialty or the United States. In the alternative, plaintiffs argue that even if Athanasios fell within an area controlled by Beys Specialty, the United States is liable because under New York tort law a landowner owes a nondelegable duty to maintain its property.

A. *Control Over the Accident Site*

On appeal, we review a district court's grant of summary judgment *de novo*, drawing all inferences from the underlying facts in favor of the nonmovant. *See Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Mindful of these standards, we agree with the district court that there is no genuine issue of material fact and that the United States is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56.

Plaintiffs' affidavit, filed in opposition to the United States' motion for summary judgment, states that no construction work was being done on the steps at the time of the accident and that there were no barricades or warning signs indicating that the area was off-limits. This evidence, however, even viewed in the light most favorable to plaintiffs, fails to establish that the USPS controlled or otherwise had responsibility for the area in question. That the stairs themselves were not under construction, or immediately surrounded by active con-

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struction work, is not dispositive. The span of a construction site is not limited to the precise area where the construction is taking place; it includes adjacent areas as well. Moreover, the absence of barricades or warning signs does not establish that the area was outside the control of the independent contractor.

Additional evidence leads conclusively to the fact that the locus of the accident was within the zone controlled by the Beys Specialty. Edgar Penny, the chief custodian of the Great Neck Post Office, on at least five occasions during his deposition, firmly and unequivocally stated that the area in which Athanasios fell was "off limits" to postal workers and used solely by the construction workers. Plaintiffs proffered no reasonably credible evidence in rebuttal. In addition, plaintiffs' own photographs indicate that the rear entrance of the post office, which is immediately adjacent to the spot where Athanasios fell, was boarded up—an unmistakable indication that the area where the accident occurred was within the zone of construction. *See* Brief for the United States, Addendum A, at 1.

B. *Nondelegable duty*

Plaintiffs argue in the alternative that, even assuming that the accident site was not within the control of the USPS, the United States is nonetheless liable because, under New York law, a landowner who holds property open to the public has a nondelegable duty to ensure that the premises are safe. *See, e.g., Thomassen v. J & K Diner, Inc.*, 549 N.Y.S.2d 416, 417 (N.Y. App. Div. 1989). Even assuming such a nondelegable duty exists, plaintiffs nonetheless are foreclosed under the FTCA from a recovery based on such a duty.

Consent of the United States to be sued " 'cannot be implied, but must be unequivocally expressed.' " *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). In the FTCA, Congress waived the United States' sovereign immunity for suits arising from any injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). "Employee" under the FTCA, however, specifically excludes "any contractor with the United States." 28 U.S.C. § 2671; *United States v. Orleans*, 425 U.S. 807, 813-14 (1976); *Logue v. United States*, 412 U.S. 521, 526-27 (1973). Thus, as a general rule, sovereign immunity precludes suits against the United States for injuries caused by its independent contractors.

The facts, viewed in the light most favorable to plaintiffs, fail to support a reasonable inference that Beys Specialty was an "employee" within the meaning of the Act. The United States did not maintain control of "the detailed physical performance of the contractor," *Logue*, 412 U.S. at 527-28, or supervise "its day-to-day operations," *Orleans*, 425 U.S. at 815. The only arguable indicia of control, the government's retention of a right to inspect the progress of construction, does not convert a contractor into a federal employee. *See, e.g., Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990).

Plaintiffs, however, contend that under New York's putative nondelegable duty, *see* 28 U.S.C. § 1346(b) (noting that liability under the FTCA is determined "in accordance with the law of the place where the act or omission occurred"), recovery is possible notwithstanding the FTCA's independent contractor exception. This argument fails for two reasons.

First, as the Supreme Court has explained, in adopting the independent contractor exception to liability, Congress did not simultaneously adopt the exceptions to that doctrine. *See Logue*, 412 U.S. at 528; *see also Basher v. United States*, No. 92-CV-186, 1995 WL 646343, at *3 (D. Conn. Mar. 14, 1995) (Cabranes, *J.*). Thus, any state law nondelegable duty cannot, on its own, override the United States' sovereign immunity from suits for injuries caused by its independent contractors. *See Berkman v. United States*, 957 F.2d 108, 112 (4th Cir. 1992) (holding FTCA exemption of liability for government contractors preempts state law where it imposes nondelegable duties); *Hall v. United States*, 825 F. Supp. 427, 431-32 (D.N.H. 1993) (United States not liable where plaintiff was injured in an elevator in government building and elevator maintenance delegated to independent contractor); *Rowell v. United States*, No. 89-Civ-8418, 1992 WL 315653, at *2 (S.D.N.Y. Oct. 16, 1992) (noting that if plaintiff "could predicate government liability upon New York laws imposing nondelegable duties upon landowners . . . he would subvert the express mandates of the FTCA that preclude making the government liable for acts of its independent contractors"); *Smith v. United States*, 674 F. Supp. 683, 686 (D. Minn. 1987); *Aetna Life & Cas. Ins. Co. v. United States*, 508 F. Supp. 298, 301 (N.D. Ill. 1981). *But see Dickerson, Inc. v. United States*, 875 F.2d 1577, 1582-83 (11th Cir. 1989) (holding that "the independent contractor exception in the FTCA would not insulate the Government from the contractor's negligence if the duty was non-delegable under [state] law").

Plaintiffs' theory fails for a second reason. State law nondelegable duties imposed on landowners would result, in cases such as this, in a form of strict liability

Consent of the United States to be sued " 'cannot be implied, but must be unequivocally expressed.' " *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). In the FTCA, Congress waived the United States' sovereign immunity for suits arising from any injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). "Employee" under the FTCA, however, specifically excludes "any contractor with the United States." 28 U.S.C. § 2671; *United States v. Orleans*, 425 U.S. 807, 813-14 (1976); *Logue v. United States*, 412 U.S. 521, 526-27 (1973). Thus, as a general rule, sovereign immunity precludes suits against the United States for injuries caused by its independent contractors.

The facts, viewed in the light most favorable to plaintiffs, fail to support a reasonable inference that Beys Specialty was an "employee" within the meaning of the Act. The United States did not maintain control of "the detailed physical performance of the contractor," *Logue*, 412 U.S. at 527-28, or supervise "its day-to-day operations," *Orleans*, 425 U.S. at 815. The only arguable indicia of control, the government's retention of a right to inspect the progress of construction, does not convert a contractor into a federal employee. *See, e.g., Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990).

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against the United States for injuries caused by its independent contractors. The FTCA, however, precludes government liability absent a negligent act, and, thus, "does not extend to liability without fault." *Dalehite v. United States*, 346 U.S. 15, 44 (1953); *see also Schneider v. United States*, 734 F. Supp. 239, 248 (E.D. La. 1990); *Maltais v. United States*, 546 F. Supp. 96, 101 (N.D.N.Y. 1982) (Miner, *J.*), *aff'd*, 729 F.2d 1442 (2d Cir. 1983) (mem.); *Dumansky v. United States*, 486 F. Supp. 1078, 1093 (D.N.J. 1980).

Accordingly, in rejecting plaintiffs' arguments, we hold that in this suit under the FTCA, where the United States is wholly without fault, the federal government may not be held liable for a negligent or wrongful act or omission of an independent contractor even where state law would impose liability in such instances.

III. CONCLUSION

We have considered all of plaintiffs' remaining contentions and have found them to be without merit. For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED in
ClerksOfficeEDNY
July 2, 1996

ATHANASIOS RODITIS and
CATHY RODITIS,

JUDGMENT

Plaintiffs,

-against-

CV-93-4480 (ARR)

THE UNITED STATES OF AMERICA,

Defendant.

An order of Honorable Manuel L. Real, United States District Court Judge, sitting by intercircuit assignment from the United States District Court for the Central District of California, having been filed on July 1, 1996, denying plaintiffs' motion to strike the second affirmative defense of the defendant; granting defendant's cross-motion for summary judgement and dismissing the action, it is

ORDERED and ADJUDGED that plaintiffs take nothing of the defendant; that plaintiffs' motion to stride the second affirmative defense of the defendant is denied; that defendant's cross-motion for summary judgement is granted; and, that the action is dismissed.

Dated: Brooklyn, N.Y.
July 1 , 1996

____/s/_____

Robert C. Heinemann
Clerk of Court

GEORGE LANGE III,
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the Second day of October, one thousand nine hundred and ninety-seven.

Present: HON. Ellsworth A. Van Graafeiland
HON. John M. Walder, Jr.
Circuit Judges
HON. J. Garvan Murtha
District Judge.*

ATHANASIOS RODITIS and CATHY RODITIS,

Plaintiffs-Appellants,

v.

Docket No. 96-6231

UNITED STATES OF AMERICA,

USCA
FILED 10/2/97
George Lane III
Clerk 2d Cir.

Defendant-Appellee.

A Petition for Rehearing having been filed herein by Appellants Athanasios and Cathy Roditis
Upon consideation thereof, it is Ordered thatr said motion is hereby denied.

For the Court
George Lange III,
Clerk
By:

/s/
Beth J. Meadbor
Administrative
Attorney

*The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.